

### REMARKS

Applicants respectfully request entry of the amendments and remarks submitted herein.  
Claim 29 has been canceled herein without prejudice to continued prosecution.

Claims 1-28 and 30-32 are currently pending. Reconsideration of the pending application is respectfully requested.

#### The 35 U.S.C. §112 Rejections

Claims 12, 14, and 29 stand rejected under 35 U.S.C. §112, second paragraph, as the Examiner asserted that those claims are indefinite for failing to particularly point out and distinctly claim the subject matter that Applicant regards as the invention. This rejection is respectfully traversed, in part, as follows.

The Examiner asserted that claims 12 and 14 (Applicants believe the Examiner meant claim 24, since claim 24 refers to “up to” and claim 14 does not) are indefinite for the use of “up to” because it reads on zero. Contrary to the Examiner’s assertions, the use of “up to” in claims 12 and 24 does not read on zero because the claims require that the composition (claim 12) and the method (claim 24) comprise resistant starch. Therefore, it is inherent in the claim that the value can not be zero.

The Examiner asserted that it is unclear what claim 29 encompasses because the claim does not set forth any method steps. Without acquiescing to the Examiner’s rejection, Applicants have canceled claim 29 without prejudice to continued prosecution.

In view of the amendments and remarks herein, Applicants respectfully request that the rejection of claims 12, 24, and 29 under 35 U.S.C. §112, second paragraph, be withdrawn.

#### The 35 U.S.C. §101 Rejections

Claim 29 stands rejected under 35 U.S.C. §101 because the Examiner asserted that claim 29, because there are no method steps recited, is not a proper process claim under 35 U.S.C. §101.

Without acquiescing to the Examiner's rejection, Applicants have herein canceled claim 29 without prejudice to continued prosecution. Therefore, Applicants respectfully submit that the rejection of claim 29 under 35 U.S.C. §101 is moot.

#### The 35 U.S.C. §103 Rejections

Claims 1-27 and 30-32 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Giddey et al.* (U.S. Patent No. 4,671,966) in view of *Moses et al.* (U.S. Patent No. 3,386,889). According to the Examiner, *Giddey et al.* discloses a "method of mixing a fatty material together with a starch product and sterilizing the mixture" and also discloses that "almost any type of starch can be used" (OA at page 3). Also according to the Examiner, *Moses et al.* discloses that sterilizing resistant starches and dextrins at boiling temperatures is known (OA at page 3). The Examiner asserted that it would have been obvious to sterilize yet another starch for the known function of making the product free of bacteria, and to substitute the resistant starch of *Moses et al.* for the starches of *Giddey et al.* in order to make a sterilized resistant starch. Applicants respectfully traverse this rejection.

*Giddey et al.* describes an emulsion that can be used as, for example, a thickening agent for sauces such as béchamel (see, for example, column 1, lines 5-8). The emulsion described by *Giddey et al.* includes a fatty material and a starch. Although *Giddey et al.* discloses that the starch can be any of the starches or meals known in the food industry (column 3, lines 31-35), *Giddey et al.* immediately excepts pregelified starches (see, for example, column 3, lines 35-37). One of skill in the art, in reading *Giddey et al.*, would understand that *Giddey et al.* is referring to native starches from different sources ("grain flour (wheat, rice, barley, rye, corn, oats, and others), starch from potatoes or Jerusalem artichoke, tapioca and other similar products"; column 3, lines 33-35)). *Giddey et al.* makes no mention of resistant starches. To fill this gap, the Examiner cited *Moses et al.*, which describes a fermentation media for producing the antibiotic, neomycin. The fermentation media of *Moses et al.* contains starch as the only assimilable carbohydrate (see, for example, column 1, lines 50-52), and *Moses et al.* discloses that modified starches such as an acid-resistant starch can be used (see column 1, lines 63-66).

Independent claims 1 and 16 are directed toward methods that include sterilizing a resistant starch. As explained in paragraphs [0002] – [0006] of the present application, resistant

starches are useful because they are not enzymatically digested in the small intestine; resistant starches reach the colon where they become a substrate for fermentation. As one of skill would appreciate, the sterilization of the resistant starch is necessary for its use in foodstuffs. As indicated herein, Giddey et al. makes no mention of resistant starches, and Moses et al., which the Examiner used to try to cure the deficiencies of Giddey et al., does not disclose a composition for use in a foodstuff. In fact, Moses et al. is not relevant to the claimed methods, as one of skill looking to solve the problem of the present invention would not look to the fermentation art. The Courts have recognized the scope of the relevant prior art as including that “ ‘reasonably pertinent to the particular problem with which the inventor was involved’ ” (*Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1535, 218 USPQ 871, 876 (Fed. Cir. 1983), quoting *In re Wood*, 599 F.2d 1032, 1036, 202 USPQ 171, 174 (CCPA 1979)).

The novel methods of independent claims 1 and 16 are not obvious over the disclosures of Giddey et al. and Moses et al., either alone or in combination. In view of the remarks herein, Applicants respectfully request that the rejection of the pending claims under 35 U.S.C. §103(a) be withdrawn.

Claims 10-15, 28 and 29 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Giddey et al. in view of Moses et al. and further in view of Laughlin et al. (U.S. Patent No. 5,470,839). According to the Examiner, Laughlin et al. discloses a composition that includes carbohydrate-resistant starch and protein. Applicants respectfully traverse this rejection.

The arguments above, however, demonstrate the nonobviousness of independent claims 1 and 16 over Giddey et al. and Moses et al. Therefore, the dependent claims also are nonobvious. “Dependent claims are nonobvious under section 103 if the independent claims from which they depend are nonobvious.” *In re Fine*, 837 F.2d 1071 (C.A. Fed. 1988), citing *Hartness Int'l, Inc. v. Simplimatic Eng'g Co.*, 819 F.2d 1100, 1108, 2 USPQ2d 1826, 1831 (Fed.Cir.1987); *In re Abele*, 684 F.2d 902, 910, 214 USPQ 682, 689 (CCPA 1982); and *In re Sernaker*, 702 F.2d 989, 991, 217 USPQ 1, 3 (Fed.Cir.1983). Accordingly, Applicants respectfully request that this rejection of the dependent claims under 35 U.S.C. §103(a) be withdrawn.

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CONCLUSION

Applicants respectfully request allowance of claims 1-28 and 30-32. Please apply any charges or credits to Deposit Account No. 06-1050.

Respectfully submitted,

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/M. Angela Parsons/

Date: \_\_\_\_\_

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